ANG SWEE CHUAN

v.

LIM TENG HUAN

COURT OF APPEAL, BRUNEI DARUSSALAM
TI LIANG YANG P
COMMISSIONER MACDOUGALL
COMMISSIONER HOOPER
[CIVIL APPEAL NO. 4 OF 1990]
27 NOVEMBER 1990

CONTRACT: *Acquiescence - Compensation - Equitable proprietary interest.*

LAND LAW: *Joint purchase - One half undivided share in land - Agreement between parties to allow one party A to construct house - Compensation - Whether agreement void for uncertainty - Whether acquired equitable proprietary interest in the land.*

The appellant ASC and the respondent R agreed in 1975 to purchase jointly the said lands and each party was beneficially entitled to a ½ undivided share in the lands.

In 1982, ASC began clearing the lands and in 1984 commenced building a house, and on its completion, went into occupation.

In 1988, R instituted proceedings against ASC seeking a declaration that he was the owner of ½ undivided share of the lands including a half undivided share in all fixtures thereon, possession of the land, mesne profits, an account of all rentals due, damages for deprivation of use and occupation of land, and an injunction ordering the appellant to demolish the house.

ASC resisted these claims and in his counterclaim sought a declaration that he R had been the beneficial owner of one half undivided share of the land and an injunction to restrain R from entering the land.

At the commencement of the trial, R withdrew his claim against ASC and the trial proceeded on the counterclaim.

ASC contended that both parties had agreed that only one house should be erected on land and that ASC would have exclusive occupation of it and that R would be compensated by ASC giving him another piece of land in exchange.

ASC's submission was that as a consequence of R having permitted ASC to proceed at vast expense with the erection of the house ASC had acquired an equitable proprietary interest in R's one half undivided share in the land and was therefore entitled to the relief sought in the counterclaim.

Held:

[1] R had tacitly accepted that if ASC built a house on the land for his exclusive own use, he, R would receive some form of satisfactory compensation for the effective loss of his half interest in the land. R's admitted failure to request ASC not to continue with the erection of the house shows that it would be unconscionalble to allow R to retain his interest in the land and to deny ASC the relief he seeks.

[2] The fairest solution would be grant the declaration and injunction sought by the appellant conditional upon the appellant paying to R the sum of the valuation of the land and to deduct from this the cost incurred by ASC in the formation and preparation of the site.

[Order accordingly.]

Cases referred to:
Ramsden v. Dyson [1866] LR 1HL 129
Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. [1981] 2 WLR 576
Shaw v. Applegate [1977] 1 WLR 970
Willmott v. Barber [1880] 15 Ch D 96

Legislation referred to:
Land Code [Brunei], s. 23

Other source referred to:
Snell's Principles of Equity 28th Edn.

For the appellant - Chan Thuan Chai; M/s. Choo, Chan & Wong
For the respondent - Angking Embah; M/s. D.F. Abang Zen

JUDGMENT

Commissioner Macdougall:

The appellant, who was the defendant in the Court below, appeals against the decision of Mr. Commissioner Mayo dismissing his counterclaim in an action concerning competing interests in a piece of land.

The appellant and the respondent are first cousins and residents of Brunei. In 1975 they agreed to purchase jointly a plot of land of approximately 2 acres at Kampong Subok. Since neither of them is a citizen of Brunei and was therefore not permitted to buy land in his own name they agreed to make the purchase in the names of their respective fathers, who were Brunei citizens, and to contribute equally to the purchase price of RM75,000. The respondent's father died in 1978 and that of the appellant in 1983. It is accepted that immediately prior to the events which gave rise to the dispute resulting in the present litigation each party was beneficially entitled to a one half undivided share in the land.

In 1982 the appellant began extensive levelling and site formation work on the property, and in about April 1984 commenced building a house. On its completion in about November 1985, he went into occupation. In March 1988 the respondent instituted proceedings against the appellant seeking a declaration that he, the respondent, is the owner of a one half undivided share of the land together with all attendant rights and privileges, including a half undivided share in all fixtures thereon, possession of the land, mesne profits, an account of all rentals due, damages for deprivation of use and occupation of the land, and an injunction ordering the appellant to demolish the house.

The appellant resisted these claims and counterclaimed a declaration that since April 1984 he had been the beneficial owner of all interests, rights and privileges in the one half undivided share of the land registered in the name of the respondent as administrator of the estate, and an injunction to restrain the respondent from entering the land or dealing with it in any way. However, he has always accepted that the respondent was entitled to compensation for the loss of his interest in the land. At the commencement of the trial the respondent withdrew his claim against the appellant and the trial proceeded on the counterclaim.

The case for the appellant was that the respondent had agreed that a house be constructed on the land for exclusive occupation by the appellant and his family. He testified that they had discussed the proposed plans for the house and had visited the site together on several occasions. There was no dispute that the appellant had defrayed the cost of the site formation work and that the total cost of construction of the house was between RM1.5 and RM1.8 million.

The appellant further testified that it was agreed that only one house should be erected on the land and that he had proposed to the respondent that as compensation for the loss of his half share in the land, he, the appellant, would give him one of 7 acres of land which was his share of 14 acres that he and his brother-in-law were to receive from the Brunei government. The appellant agreed to this proposal and a week or two later, on 15 March 1985, they executed a written agreement.

The relevant part of the written agreement is as follows:

Whereas:

(1) LTH (the respondent) is the registered co-owner holding as administrator of half undivided share (½ U.S.) of all that parcel of land situate at Kampong Subok Bandar Seri Begawan, Negara Brunei Darussalam containing an area of 1.942 acres, more or less described as EDR No. 13464 Lot No. 14513, Brunei Darussalam Land District (hereinafter referred to as "(A) portion of the said land").

(2) The other half undivided share (½ U.S.) of the land described hereinbefore (hereinafter referred to as "(B) portion of the said land" is still in the name of Ang Sim Poh, deceased. Ang Sim Poh's eldest son is ASC (the appellant who has applied to take out letters of administration in respect of his father's estate.

(3) ASC has at his sole cost and expense since April 1984 with the consent of LTH constructed thereon both (A) portion of the said land and (B) portion of the said land described hereinbefore a residential house (hereinafter referred to as "the said house"). LTH hereby acknowledges that he has no claim whatsoever on the said house.

(4) The parties hereto has (*sic*) agreed to an exchange of land, LTH's (A) portion of the said land in exchange for ASC's parcel of land described in the schedule hereto (hereinafter referred to as "the said land").

Now this agreement witnesseth as follows:

(1) LTH and ASC hereby agree to an exchange of land; LTH's (A) portion of the said land in exchange for ASC's said land.

(2) Upon transfer of the said land into the name of ASC, ASC undertakes that he shall immediately thereafter transfer one (1) acre of the said land into the name of LTH or to his nominee or nominees.

(3) At the same time as the transfer of the said land into the name of LTH, LTH undertakes that he shall transfer (A) portion of the said land into the name of Ang Siew Ting (Brunei Yellow I.C. No. 042404) of No. 3, Jalan McArthur, Bandar Seri Begawan, Negara Brunei Darussalam, the nominee of ASC.

(4) The parties hereto agree that each of them shall pay for the respective costs in the preparation of any transfer documents, stamp duty and all incidental expenses.

(5) That this agreement is binding on the successors, heirs and personal representatives of the parties hereto.

(6) The costs and expenses in the preparation of this agreement shall be borne by ASC.

The schedule above referred to

One (1) acre of the land which shall be allotted to Ang Swee Chuan by the government of Negara Brunei Darussalam for the replacement of Ang Swee Chuan parcel of land situate at Kg. Sungai Kebun and described as EDR 106 Lot No. 124 and which said parcel of land has been acquired by the Government of Brunei Darussalam.

The case for the respondent, however, was that he had never agreed that the appellant could erect a house on the land. Indeed, according to him, he did not become aware that any work had been carried out on the site until early 1985 when he discovered that construction had progressed to the upper floor of what subsequently was to become a two storey house. Even then, as the house itself occupied only one eighth of the total area of the land, he thought that the appellant had acted within his legal rights in erecting it and that in any event there was ample space on the remainder of the plot on which he could build a house of his own.

On completion of the house in about November of the same year the appellant erected a fence which encircled almost the entire area of the land. It seems that it was not until then that the respondent took exception to the appellants activities. This emerges from a passage in his examination-in-chief in which, having said that the fencing covered almost all the land, he immediately went on to say that had the house been built on only half the land he would have raised no objection. Indeed he also said that when he first became aware of the construction work in early 1985 he sought an explanation from the appellant and, on being assured that the house did not infringe on his part of the land, was quite satisfied.

As to the written agreement the respondent's testimony was confusing and conflicting. On the one hand he said that when the house was half completed the appellant had offered to give him an acre of land as compensation for the loss of his share of the suit land. In response to a question from the Commissioner he also said that as stated in the written agreement of March 1985, he had been willing at that time to accept undeveloped land in exchange for his half share. However, immediately following this admission the respondent denied that he had heard of the agreement until 1988, that he had signed it or had discussed its contents. Later in his testimony he seemed to accept that it was a genuine agreement. This was as a result of the finding of a handwriting expert that the signature in the respondent's name was his authentic signature. Shortly after this apparent admission he went on to say that he really did not think that he had acknowledged the written agreement.

Mr. T.C. Chan who appeared for the appellant both in this Court and the Court below and to whom we are indebted for his lucid and closely reasoned submission, accepted before the Commissioner that the written agreement was probably void for uncertainty. This concession was founded on the fact that the identity of the land which the respondent was to receive in exchange for his share in the suit land was unascertained. Although the Commissioner did not positively find that the agreement was void, it is clear that he must have treated it as being so. He accepted Mr. Chan's submission that it provided evidence that the respondent had in fact consented in March 1985 to the appellant proceeding with the construction of the house. He also observed that it made it plain that the parties had contemplated that the portion of the land on which the appellant could erect the house was not restricted to any specific area.

Mr. Chan frankly conceded before us that the written agreement is void for uncertainty. We have no doubt that this is correct. We are also of the opinion that the Commissioner was entirely justified in using the written agreement as evidence of what the parties had agreed or accepted both before construction of the house began and in March 1985. At the suggestion of Mr. Chan and with the consent of Mr. Anking for the respondent we visited the site. It seemed to us from the location of the house in the middle of the land and from the topography that once construction began it would have been obvious for both aesthetic and practical reasons that it was intended that it should be the only house to be built there.

The commissioner found that the appellant had genuinely believed that the respondent would not object to his erecting a house on the land for his own exclusive use, and that all along the respondent excepted that should the appellant do so he would adequately compensate him. Indeed, recital 3 of the written agreement clearly states that the respondent consented to the appellant constructing the house in 1984. Recital 4 supports the finding of an expectation by the respondent that he would be compensated.

We find it somewhat strange in the light of these eminently reasonable findings that the Commissioner also stated that he accepted the respondent's explanation that he had not requested the appellant to bring work on the house to a halt because first, his family were anxious that they should not become involved in a dispute with the appellant, his cousin, secondly, he did not want the appellant to suffer serious financial loss and, thirdly, the house did not occupy the entire land. Acceptance of this explanation does not stand comfortably with the earlier findings. If, as the Commissioner found, the respondent had always understood that should the appellant build on the land he would be compensated for the effective loss of his half interest, no question of requesting the appellant to stop work on the house would ever have arisen. However, for reasons which will become apparent, we do not think that this apparent inconsistency has any bearing on the outcome of this appeal.

Mr. Chan's central submission both in this Court and in the Court below was that as a consequence of the respondent having permitted the appellant to proceed at vast expense with the erection of the house the appellant had acquired an equitable proprietary interest in the respondent's one half undivided share in the land and was therefore entitled to the relief sought in the counterclaim.

In support of his contention that equity would grant relief to the appellant Mr. Chan cited to the Commissioner a passage from the speech of Lord Cranworth in *Ramsden v. Dyson* [1866] LR 1HL 129:

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.
>
> But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner.

He also referred to the chapter in *Snell's Principles of Equity* 28th Edn., concerning equitable estoppel, and in particular to the passage at p. 563 headed 'Conferment of Title'.

The Commissioner concluded that, while he had the greatest sympathy for him, the appellant had, on the basis of his findings, failed to meet the test adumbrated by Lord Cranworth. He also expressed the view that the principles enunciated in *Snell* were of no assistance to the appellant because the respondent had not been guilty of any conduct which would have had the effect of depriving him of his rights. He also concluded that it was not open to him to grant the relief sought on the counterclaims pleaded.

We think it is fair to say that the gist of the appellant's grounds of appeal is that the Commissioner erred in law by holding that as the respondent had not been guilty of any conduct which would justify an order depriving him of his rights in the land he was not

estopped from asserting and claiming his one half undivided share in it against the appellant.

It is unfortunate that, although one of the footnotes to the passage in *Snell* under the heading 'Conferment of Title' refers to the case of *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.* [1981] 2 WLR 576 immediately after a reference to *Ramsden v. Dyson*, Mr. Chan did not specifically cite that case to the Commissioner. Had he done so the outcome may have been different.

In *Taylors* case Oliver J, having embarked on an exhaustive and illuminating analysis of the authorities starting from *Ramsden v. Dyson*, held that the doctrine of estoppel by acquiescence was not restricted to cases where the representor was aware both of what his strict rights were and that the representee was acting in the belief that those rights would not be enforced against him. Instead, the Court was required to ascertain whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment. It is thus not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could do what he did, but merely that in the circumstances of the case it would be unconscionable for him to deny that which he allowed the representee to assume to his detriment.

Having referred at p. 587 to the following passage of the speech of Lord Kingsdown in *Ramsden v. Dyson*:

> The rule of law applicable to the case appears to me to be this; If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise of expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* [1911] Ves Jun 23.328, and as I conceive, is open to no doubt.

Oliver J later went on to say at p. 590:

> In *Gregory v. Mighell*, 18 Ves Jun 23.328, the case relied on by Lord Kingsdown in formulating his proposition, the defendant was estopped from claiming that the plaintiff's possession was non-consensual so as to render it unavailable as an act of part performance. Here again this does not seem to have been a unilateral misapprehension as to what the legal position was when possession was taken. Nor, in my judgment, is any such essential condition deducible from the cases following *Ramsden v. Dyson*, LR 1 HL 129 and particularly from the more modern authorities. The fact is that acquiescence or encouragement may take a variety of forms. It may take the form of standing by in silence whilst one party unwittingly infringes another's legal rights. It may take the form of passive or active encouragement of expenditure or alteration of legal position upon the footing of some unilateral or shared legal or factual supposition. Or it may, for example, take the form of stimulating, or not objecting to, some change of legal position on the faith of a unilateral or a shared assumption as to the future conduct of one or other party. I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate in every combination of circumstances, the considerations which will persuade the Court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a Court of equity will interfere. Nor, in my judgment, do the authorities support so inflexible an approach, and that is particularly so in cases in which the decision has been based on the principle stated by Lord Kingsdown.

Later, in referring to what are described as the five *probanda* of proprietary estoppel or estoppel by acquiescence stated by Fry J in his frequently cited judgment in *Willmott v. Barber* [1880] 15 Ch D 96, Oliver J had this to say at p. 592:

> Mr. Millett's dichotomy (between proprietary estoppel by acquiescence or encouragement on the one hand and estoppel by representation and promissory estoppel on the other) does, it is fair to say, derive some small support from the judgment of Evershed MR in *Hopgood v. Brown* [1955] 1 WLR 213, 223 where he refers to Fry J's formulation of the requisites of estoppel in *Willmott v. Barber*, 15 Ch D 96 as addressed and limited to cases of estoppel by acquiescence and as not intended as a comprehensive formulation of the necessary requisites of estoppel by representation. That, however, does not necessarily imply his acceptance of the proposition that all the *probanda* are applicable to every case of estoppel by acquiescence and it seems clear from his earlier pronouncement in *Electrolux Ltd. v. Electrix Ltd.* [1954] 71 RPC 23, 33 that was not indeed, his view.

Finally, at p. 595 he referred to two passages. The first is from the judgment of Buckley LJ in *Shaw v. Applegate* [1977] 1 WLR 970, the concluding paragraph of which is:

> The real test, I think, must be whether on the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.

The second is from the judgment of Goff LJ in the same case where in referring to the judgment in *Willmott v. Barber* the learned Lord Justice said:

> But for my fact, I share the doubts entertained by Evershed MR in (*Electrolux Ltd. v. Electric Ltd*. [1954] 71 RPC 23) whether it is necessary in all cases to establish the five tests which are laid down by Fry J and I agree that the test is whether, in the circumstances, it has become unconscionable for the plaintiff to rely on his legal right.

We respectfully accept Oliver J's analysis as correctly stating the law, and have no doubt that applying the law to the present case the appellant must succeed.

In the light of the Commissioner's finding that the respondent had at least tacitly accepted that if the appellant built a house on the land for his own exclusive use, he, the respondent, would receive some form of satisfactory compensation for the effective loss of his half interest in the land, coupled with the respondent's admitted failure to request the appellant not to continue with the erection of the house, it is clear that it would be unconscionable to allow the respondent to retain his interest in the land and to deny the appellant the relief he seeks.

Even on the basis of a finding more favourable to the respondent that might be inferred from the Commissioner's acceptance of his explanation that he did not request the appellant to cease work on the project in 1985 because to have done so would have cause the latter grave financial loss, the fact remains that at all times the appellant genuinely thought he was acting within his rights, and the respondent, whatever his reason or reasons might have been for so doing, allowed him to proceed with the construction of the house.

We do not understand why the Commissioner was of the view that it was not open to him to grant the relief sought in the counterclaim as pleaded. In giving equitable relief to the appellant we fully accept that the respondent must be compensated for the loss of his interest in the land. Effect must be given to the equity in whatever is the most appropriate way.

Mr. Anking proposed that we should order that compensation be effected by the appellant transferring to the respondent or his nominee one of several properties in which he is to have an interest. We see several obvious objections to his proposal, not the least of which

would be the difference in value between each of the various plots of land on the one hand and that of the said land on the other, and the legal difficulty created by s. 23 of the Land Code.

We have come to the conclusion that the fairest solution would be to grant the declaration and injunction sought by the appellant conditional upon the appellant paying to the respondent the sum of RM217,500.

This figure is arrived at on the basis of a valuation of the land alone assessed by C.H. Williams, Talhar & Wong (B) Sdn. Bhd. this year.

From this is deducted the cost incurred by the appellant in the formation and preparation of the site. Half the resulting sum is RM217,500.

We therefore so order. The appellant is to have the costs of the hearing in this Court and in the Court below.

Also found at [1991] 3 CLJ 2244